No. 1401

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

CASE No. 23,748.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

APPENDIX TO BRIEF.

INDEX.

	PAGE
Statute	1
Regulations	3
Proceedings:	
Docket Entries	9
Petition	11
Exhibit A, Attached to Petition	16
Answer	20
Minutes of Proceedings	22
Stipulation of Facts	23
Exhibit 1-A, Attached to Stipulation of Facts	27
Opinion	31
Decision	41
Petition to Reverse Decision	42
Notice of Filing Petition for Review	48
Certificate	49

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NETTIE M. PIPE, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Statute.

Internal Revenue Code of 1939.

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

(e) BEQUESTS, ETC., TO SURVIVING SPOUSE.—

(1) ALLOWANCE OF MARITAL DEDUCTION.—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * * *

(F) Trust with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free

of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This paragraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * * * *

Regulations.

Regulations 105—Estate Tax

SEC. 81.47a. *Bequests, etc., to surviving spouse.*—

(a) *Allowance of marital deduction.* In the case of the estate of a citizen or resident of the United States dying after December 31, 1947, there may be deducted the value of any property interest (except as otherwise provided in sections 81.47b and 81.47d) which passed from the decedent to his surviving spouse. Such deduction is hereinafter referred to as the "marital deduction."

* * * * * * *

Regulations.

In order to obtain the marital deduction with respect to any property interest the executor must establish the following facts:

(1) That the decedent was survived by his spouse;

(2) That such property interest passed from the decedent to such spouse (see paragraphs (b) to (h), inclusive, of this section);

(3) That such property interest is a "deductible interest" (see section 81.47b);

(4) The value of such property interest (see section 81.47c); and

(5) The value of the "adjusted gross estate" (see section 81.47d).

* * * * * *

(b) *Definitions*—(1) *Passed from the decedent.* As used in this and the three succeeding sections, the expressions "passed from the decedent", "passed from the decedent to his surviving spouse", and "passed from the decedent to a person other than his surviving spouse", have the meanings stated in this paragraph. Except as otherwise indicated in subparagraphs (2) and (3) of this paragraph, the following rules are applicable in determining the person to whom any property interest "passed from the decedent":

(i) Property interests devolving upon any person (or persons) as surviving coowner with the decedent under any joint ownership wherein the right of survivorship existed are considered as having passed from the decedent to such person (or persons).

(ii) Property interests at any time subject to decedent's power to appoint (whether alone or in conjunction with any person) are considered as

having passed from the decedent to the appointee under his exercise of the power, or, in case of release or nonexercise, as having passed from the decedent to the taker in default of exercise.

(iii) The dower or curtesy interest (or statutory interest in lieu thereof) of the decedent's surviving spouse is considered as having passed from the decedent to such spouse.

(iv) In the case of insurance upon the life of the decedent, the proceeds are considered as having passed from the decedent to the person who, at the time of the decedent's death, was entitled to receive such proceeds.

(v) Subject to the rules stated in subdivisions (i) to (iv), inclusive, of this subparagraph, any property interest transferred during life, bequeathed or devised by the decedent, or inherited from the decedent, is considered as having passed to the person to whom he transferred, bequeathed, or devised such interest, or to the person who inherited such interest from him.

* * * * * *

(2) *Passed from the decedent to his surviving sponse.* In general, the definition stated in subparagraph (1) of this paragraph is applicable in determining the property interests which "passed from the decedent to his surviving spouse". Special rules are provided, however, in the case of certain trusts with power of appointment in the surviving spouse, in the case of proceeds held by the insurer under a life insurance, endowment, or annuity contract, with power of appointment in the surviving spouse, and in the case of certain interests passing by will (whether or not in trust) from decedents dying after December 31, 1947, and on or before April 2, 1948.

* * * * * *

The following are given as illustrative; (i) A property interest bequeathed in trust by H (the decedent) is considered as having passed from him to W (his surviving spouse) if the trust income is payable to W for life and upon her death the corpus is distributable to her executors or administrators, or if W is entitled to the trust income for a term of years following which the corpus is to be paid to W or her estate, or if the trust income is to be accumulated for a term of years or for W's life and the augmented fund paid to W or her estate, or if the terms of the trust meet the requirements of paragraph (c) of this section; * * *.

* * * * * * *

(c) *Trust with power of appointment in surviving spouse.* In the case of property interests which passed from the decedent to a trust, the terms of which satisfy the five conditions stated in this paragraph, the expression "passed from the decedent to his surviving spouse" embraces not only the beneficial interest therein of such spouse but also the interest therein subject to her power to appoint. (As to the treatment of trusts not meeting such conditions, see paragraph (b)(2) of this section.) The five conditions which must be satisfied by the terms of the trust are as follows:

(1) The surviving spouse must be entitled for life to all the income from the corpus of the trust.

(2) Such income must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power, exercisable in favor of herself or of her estate, to appoint the entire corpus free of the trust.

(4) Such power in the surviving spouse must be exercisable by such spouse alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The corpus of the trust must not be subject to a power in any other person to appoint any part thereof to any person other than the surviving spouse.

In determining whether the above-stated conditions (1) to (5), inclusive, are satisfied by the terms of the trust, regard is to be had to the applicable provisions of the law of the jurisdiction governing the administration of the trust. * * *.

* * * * * *

SEC. 81.47b. *Nondeductible interests*—(a) *General.*

The property interests which passed from the decedent to his surviving spouse (as set forth in section 81.47a) fall within two general categories: (1) those with respect to which the marital deduction is authorized, and (2) those with respect to which the marital deduction is not authorized. Such categories are hereinafter referred to as "deductible interests" and "nondeductible interests", respectively. As to the several classes of "nondeductible interests" see paragraphs (b) to (g), inclusive, of this section.

* * * * * *

(d) *Interest in property which another person may possess or enjoy.* Section 812(e)(1)(B) provides that no marital deduction shall be allowed with respect to certain property interests (referred to generally as "terminable interests") which passed from the decedent to his surviving spouse, in case—

(1) An interest in the same property passed at any time (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such spouse (or the estate of such spouse), and

(2) By reason thereof, such person (or his heirs or assigns) may possess or enjoy any part of such property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse.

The foregoing provision is applicable only where interests in the same property passed from the decedent both to his surviving spouse, and to some other person (for less than an adequate and full consideration in money or money's worth), and is applicable irrespective of whether both such interests passed from the decedent at the same time or under the same instrument. Under such circumstances, if the other person to whom an interest passed may, by reason thereof, possess or enjoy any part of the property after the termination or failure of the interest therein which passed from the decedent to his surviving spouse, the latter interest is a "non-deductible interest".

* * * * * *

In the following examples it is assumed that the property interest which passed from the decedent to a person other than his surviving spouse was not for an adequate and full consideration in money or money's worth:

* * * * * *

(ii) H devised real property to W ~~for~~ life, and created in W a power, exercisable by will, to appoint the remainder interest to any person. In default of appointment by W, the remainder interest was to go to A and his heirs. Assuming that under the local law W did not take the real property as absolute owner, nor as trustee of a trust meeting the requirements of section 81.47a(c), the interest which passed from H to W is a "nondeductible interest" since such interest will terminate upon her death and A (or his heirs or assigns) may thereafter possess or enjoy the property.

[R. 1-2]

PROCEEDINGS.

Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner, *vs.* Commissioner of Internal Revenue, Respondent.	Docket No. 39831.

Docket Entries.

Appearances:

For Petitioner: Edmund W. Pavenstedt, Esq.,
For Respondent: Rigmor O. Carlsen, Esq.

3/ 5/54—Reassigned from Judge Opper, (Div. 14), to Judge Fisher, (Div. 15).
7/21/54—Reassigned from Judge Fisher to Judge Opper.

1952

Apr. 7—Petition received and filed. Taxpayer notified. Fee paid.
" 8—Copy of petition served on General Counsel.
" 17—Request for hearing at New York City filed by taxpayer. 4/24/52—Granted.
May 28—Answer filed by General Counsel.
June 3—Copy of Answer served on Taxpayer, New York, N. Y.

1953

Feb. 6—Hearing set March 30, 1953, New York, N. Y.
Mar. 30—Hearing had before Judge Opper on the merits, Stipulation of Facts with attached exhibits 1-A and 2-B filed. Briefs due 5/14/53; Replies due 5/29/53.

Apr. 16—Transcript of Hearing 3/30/53 filed.
May 11—Motion for extension to June 15, 1953 to file brief filed by General Counsel. 5/14/53—Granted.
May 15—Stipulation to correct transcript filed. Granted.
June 10—Motion for extension to August 17, 1953 to file brief filed by General Counsel. 6/12/53—Granted.
" 17—Motion for extension to Sept. 30, 1953 to file reply brief filed by taxpayer. 6/19/53—Granted.
" 25—Brief filed by taxpayer.
Aug. 17—Motion for extension to Aug. 27, 1953 to file brief, filed by General Counsel. 8/19/53—Granted.
" 27—Brief filed by General Counsel.
" 28—Copy of brief served on General Counsel.

1954.

Oct. 22—Opinion filed, Judge Opper, Decision will be entered under Rule 50. Copy served.
Nov. 19—Motion for rehearing with attached memorandum in support thereof filed by petitioner. 11/23/54—Denied.

1955

Mar. 18—Agreed computation filed.
" 21—Decision entered, Judge Opper, Div. 14.
June 15—Petition for Review by U. S. Court of Appeals for the Second Circuit with assignments of error filed by petitioner.
" 15—Proof of service filed.

[R. 3-12]

Petition.

THE TAX COURT OF THE UNITED STATES.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, *against* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 39831.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau Symbols UNY:COMF:PS) dated January 30, 1952, and as a basis of its proceeding alleges as follows:

1. The petitioner is the duly appointed, qualified and acting Executrix of the Estate of Edward F. Pipe, deceased, who died on September 20, 1948. The petitioner was appointed Executrix by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948. The petitioner's address is 18 Midland Avenue, White Plains, New York. The Federal estate tax return of the decedent was filed with the Collector of Internal Revenue for the Fourteenth District of New York on November 10, 1949.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on January 30, 1952.

3. The tax in controversy is an estate tax in the amount of $19,310.29.

4. The determination of the tax set forth in the said notice of deficiency was based upon the following errors:

(a) Respondent erred in determining that bequests to the surviving spouse in the amount of $217,429.84 did not qualify for deduction under Section 812(e) of the Internal Revenue Code, and consequently erred in failing to allow as a deduction from the gross estate of the decedent under Section 812(e) of the Internal Revenue Code the amount of $141,473.55, representing the marital deduction for bequests to the surviving spouse of the decedent.

(b) Respondent erred in failing to allow as a deduction from the decedent's gross estate a reasonable amount of administration expenses and attorneys' fees in addition to that claimed in the return which has or will be incurred, including the additional amount of expense in determining the estate tax liability.

(c) Respondent erred in failing to allow credit for a voluntary payment of additional estate tax amounting to $2,551.69.

5. The facts upon which the petitioner relies as the basis for this proceeding are, upon information and belief, as follows:

(a) Decedent was at the date of his death a resident of the United States.

(b) The last will and testament of the decedent was admitted to probate by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948.

(c) In the Federal estate tax return of the decedent, the petitioner elected to have the gross estate of the decedent valued as of September 20, 1949, as authorized by Section 811(j) of the Internal Revenue Code.

(d) Decedent in Article THIRD of his last will and testament provided as follows:

"THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate', I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

"I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property."

(e) The value at the optional valuation date of the property passing under Article THIRD of the decedent's will was $217,429.84.

(f) The entire value of the property passing under Article THIRD of the decedent's will was included in the decedent's gross estate.

(g) The estate of the decedent has necessarily incurred and will necessarily incur additional attorneys' fees and administration expenses, including the expense of the controversy involved herein, the amount of which has not presently been determined.

(h) On February 16, 1950, the petitioner made to the Collector of Internal Revenue for the Fourteenth District of New York a voluntary additional payment of estate tax amounting to $2,551.69.

WHEREFORE, the petitioner prays that this Court may hear this proceeding and disallow the said alleged deficiency to the extent of $19,310.29 and grant such other and further relief as may be justified in the premises.

/s/ EDMUND W. PAVENSTEDT,
Counsel for Petitioner,
14 Wall Street,
New York 5, New York.

Petition.

STATE OF NEW YORK,
COUNTY OF WESTCHESTER, } ss.:

NETTIE M. PIPE, being duly sworn says that she is the Executrix of the Estate of EDWARD F. PIPE, the petitioner named above, and as such is authorized to sign and verify the foregoing petition; that she has read the foregoing petition or had the same read to her and is familiar with the statements contained therein, that the statements contained therein are true, except those stated to be on information and belief, and that those she believes to be true.

/s/ NETTIE M. PIPE.

Subscribed and sworn to before me
this 1st day of April, 1952.

/s/ HARRY KLINGER

HARRY KLINGER
Notary Public, State of New York
No. 60-7304700
Qualified in Westchester County
Term expires March 30, 1954

(NOTARIAL SEAL)

Exhibit A, Attached to Petition.

U. S. TREASURY DEPARTMENT
Office of Internal Revenue Agent in Charge
341 Ninth Avenue,
New York 1, N. Y.

JAN 30 1952

UNY:CONF:PS.

Estate of Edward F. Pipe,
Mrs. Nettie M. Pipe, Executrix,
18 Midland Avenue,
White Plains, New York

Dear Mrs. Pipe:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $21,861.98, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of UNY:CONF:PS. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest,

since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,

By JOHN A. VEIT,
Internal Revenue Agent in Charge.

Enclosures:

Statement
Form 1276
Agreement Form

PS/PL.

Estate of Edward F. Pipe.
Date of Death—Sept. 20, 1948.

STATEMENT

	Liability	Assessed	Deficiency
Estate Tax	$34,491.09	$12,629.11	$21,861.98

In making this determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the report of examination, a copy of which was transmitted to you on April 6, 1950; to the protest filed on May 3, 1950; and to the statements made at the conferences held on June 8, 1950, January 12th and August 21, 1951.

A copy of this letter and statement has been mailed to your representative, White and Case, 14 Wall Street, New York 5, New York, in accordance with the authority contained in the power of attorney executed by you.

Exhibit A, Attached to Petition.

ADJUSTMENTS TO NET ESTATE

Net estate for basic tax as disclosed by return	$ 32,092.31
Additions to value of net estate and decreases in deductions:	
Stocks and Bonds	3.55
Transfers During Decedent's Life	18,758.93
Marital Deduction	59,982.50
Net estate for basic tax as adjusted	$110,837.29
Net estate for additional tax as adjusted	$150,837.29

EXPLANATION OF ADJUSTMENTS

Stocks and Bonds:

	Returned	Determined
Item 15	$ 4,178.63	$ 4,190.18
Item 22: Dividend	8.00	0.00

Item 15 is determined to be worth $4,190.18 as of the optional valuation date.

The dividend under Item 22 as returned is eliminated from the gross estate as same does not represent includible property.

Transfers During Decedent's Life:

	Returned	Determined
Item 1	$ 7,850.13	$17,230.01
Item 2	7,850.13	17,229.18

The value of the joint and survivorship annuity contract with the Travelers Insurance Co. No. 2274811 is determined to be $17,230.01 and the value of the similar policy issued by the Connecticut General Life Insurance Co. No. 68262 is determined to be $17,229.18.

Exhibit A, Attached to Petition.

	Returned	Determined
Marital Deduction	$132,092.32	$72,109.82

The deduction claimed in the return, Form 706, as bequests to the surviving spouse in the amount of $217,426.29 is disallowed, it having been determined that the bequest does not qualify for deduction under Section 812(e) of the Internal Revenue Code.

COMPUTATION OF TAX

	Determined	
Net estate for basic tax	$110,837.29	
Net estate for additional tax	$150,837.29	
Gross basic tax	$ 1,825.12	
Credit for State inheritance taxes	1,460.10	
Gross basic tax less credit		$ 365.02
Total gross taxes (basic and additional)	$ 35,951.19	
Less gross basic tax	1,825.12	
Gross additional tax		34,126.07
Net tax payable		$34,491.09
Estate Tax Assessed:		
Orig. Nov. 1949 Reg. List, Page 02, Line 0		12,629.11
Deficiency		$21,861.98

[R. 14-15]

Answer.

THE TAX COURT OF THE UNITED STATES

Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent.	Docket No. 39831.

Comes now the Commissioner of Internal Revenue, through his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is alleged that the date of filing the Federal estate tax return is November 14, 1949.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition. Alleges that the deficiency asserted is $21,861.98.

4 (a), (b) and (c). Denies that the Commissioner erred as alleged in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5 (a) and (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c). Admits only that petitioner elected to have the gross estate of the decedent valued as of a date subsequent

to decedent's death, as authorized by Section 811(j) of the Internal Revenue Code. Denies the remaining allegations set forth in subparagraph (c) of paragraph 5 of the petition.

(d). Denies the allegations contained in subparagraph (d) of paragraph 5 of the petition on the ground that the said instrument itself is the best evidence of its contents.

(e). Denies the allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f). Denies the allegations contained in subparagraph (f) of paragraph 5 of the petition.

(g). Denies the allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h). Denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

Denies generally and specifically each and every allegation of the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

(Sgd.) CHARLES W. DAVIS, HDT
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

HAROLD D. THOMAS,
Acting District Counsel,

RIGMOR O. CARLSEN,
Special Attorney,
Bureau of Internal Revenue.

ROC-cmp 5/21/52

[R. 18]

Minutes of Proceedings.

THE TAX COURT OF THE UNITED STATES.

Date March 30, 1953. Place New York, N. Y. Docket No. 39831.

Proceeding Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix.

Assigned to Judge Clarence V. Opper. Division No. 14.

Counsel

For Petitioner, E. W. PAVENSTEDT, Esq., 14 Wall Street, New York 5, N. Y.

For Respondent, RIGMOR O. CARLSEN, Esq.

Stenographic Reporter, H. B. Smith.

Hearing 11:45-12:15 { Transcript Ordered Yes

ORDERED

Filed at hearing
Stipulation of facts with attached exhibits 1-A and 2-B.

Petitioner's brief	May 14, 1953	May 29, 1953
Respondent's brief	May 14, 1953	May 29, 1953

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STAT
JUDGE Judge Opper

(Signed) ROBERT I. BOWLES,
Deputy Clerk.

[R. 19-23]

Stipulation of Facts.

THE TAX COURT OF THE UNITED STATES.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, *against* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 39831.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, through their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with or contradictory to the facts herein stipulated:

1. The Petitioner is the duly appointed, qualified and acting Executrix of the Estate of Edward F. Pipe, deceased (hereinafter sometimes referred to as the "decedent"), a resident of White Plains, New York, who died on September 20, 1948. The Petitioner was appointed Executrix by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948. The Petitioner's address is 18 Midland Avenue, White Plains, New York.

2. The Last Will and Testament of the decedent was admitted to probate by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948.

3. In the Federal Estate tax return of the decedent, the Petitioner elected to have the gross estate of the decedent valued in accordance with values as of a date or dates

subsequent to the decedent's death, as authorized by Section 811(j) of the Internal Revenue Code (hereinafter sometimes referred to as the "optional valuation date").

4. On November 14, 1949, Petitioner, as Executrix, filed a Federal estate tax return for the Estate of Edward F. Pipe, deceased, and paid to the Collector of Internal Revenue, Fourteenth District of New York $12,629.11, the amount of tax shown thereon. On February 15, 1950, Petitioner signed a waiver, United States Treasury Department Form 890, agreeing to the assessment of a deficiency in estate tax in the sum of $2,551.69, together with interest thereon as provided by law. This deficiency resulted from determinations by the examining revenue agent increasing the value of certain securities by $3.55 and the value of certain survivorship annuities by $18,758.93. On February 17, 1950, Petitioner paid $2,551.69 to said Collector. On March 7, 1950, Petitioner paid to said Collector $24.56, representing interest on said $2,551.69 from December 20, 1949 to February 17, 1950. On January 30, 1952, the Office of the Internal Revenue Agent in Charge, 341 Ninth Avenue, New York City, New York, sent a ninety-day letter (copy of which is attached to the petition herein, marked Exhibit A) to Petitioner determining a deficiency in estate tax of $21,861.98. The statement attached to the ninety-day letter shows that said deficiency was based upon the above described additions to value of estate in the respective amounts of $3.55 and $18,758.93, and upon a further addition to value resulting from the disallowance of the marital deduction to the extent of $59,982.50. When computing this deficiency, no allowance was made for the above described payment of $2,551.69. On April 7, 1952 Petitioner filed a petition with the Tax Court of the United States for redetermination of said deficiency. Thereafter, in order to stop the running of interest, Petitioner on April 9, 1952 paid to said Collector the amount of the balance of the

alleged deficiency of $19,310.29, and interest thereon amounting to $2,642.29, or a total of $21,952.58.

5. In the statement attached to the ninety-day letter referred to in paragraph 4, the marital deduction allowable under Section 812(e) of the Internal Revenue Code was reduced for the following reason:

> "The deduction claimed in the return, Form 706, as bequests to the surviving spouse in the amount of $217,462.29 is disallowed, it having been determined that the bequest does not qualify for deduction under Section 812(e) of the Internal Revenue Code."

6. Decedent in Article Third of his last Will and Testament provided as follows:

> "THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate', I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.
>
> "I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary

estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property."

7. The value at the optional valuation date of the property passing under Article THIRD of the decedent's Will was $217,429.84.

8. The entire value of the property, valued as of the optional valuation date, passing under Article THIRD of decedent's Will, was included in the decedent's gross estate in the Federal estate tax return filed by Petitioner and in the statement attached to the ninety-day letter dated January 30, 1952, referred to in paragraph 4 hereof.

9. The estate of the decedent has necessarily incurred, and will necessarily incur, additional attorneys' fees and administrative expenses, including the expense of the controversy involved herein, the amount of which has not presently been determined.

.....

Attorney for Petitioner.

.....

Attorney for Respondent.

Dated: October , 1952.

Exhibit 1-A, Attached to Stipulation of Facts.

I, EDWARD F. PIPE, a resident of the State of New York, do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking any and all other wills and codicils by me at any time heretofore made.

FIRST: I direct my Executrix to pay all my just debts, funeral expenses and all expenses of my last illness as soon after my death as is practicable.

SECOND: I give, devise and bequeath to my wife, NETTIE M. PIPE, absolutely and forever, all real property, together with improvements thereon, which I may own or to which I may be entitled at the time of my death, and all my personal effects, clothing, books, pictures, furniture, furnishings, household equipment and automobiles.

THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any

Exhibit 1-A, Attached to Stipulation of Facts.

2. To sell, lease, mortgage and exchange all or any part of my estate, both real and personal, at such times and at public or private sale, and upon such terms and conditions as my Executrix or Executor may deem best.

3. In her or its sole discretion, to cause the securities which may from time to time comprise the funds in her or its hands to be registered in her or its name as Executrix or Executor or in the name of a nominee or nominees.

4. In dividing my estate or any portion thereof into parts or shares or in making distribution thereof, in her or its discretion, to make such division, delivery or distribution in kind, or partly in kind and partly in money, and to allot to any share or shares, in equal or unequal proportions, specific securities or property or any undivided interest therein.

5. To vote in person or by proxy upon all stocks or other securities held by her or it.

6. To settle, adjust, compound or dispose of on any terms and with or without allowing or obtaining any time or giving any security, claims and demands belonging to or made against me or my estate.

SEVENTH: I direct that all estate, succession, transfer, legacy and inheritance taxes and all interest and penalties thereon assessed by the United States or the State of New York against or with respect to any property required to be included as an asset of my gross estate for the purpose of determining said taxes shall be paid out of my residuary estate as an expense of administration and as a general charge thereon, and that no person receiving any part of my estate under this Will shall be required to reimburse my estate for any part of such taxes, and no apportionment of such taxes shall be made on any accounting or distribution of my estate, any law to the contrary notwithstanding.

IN WITNESS WHEREOF, I have hereunto set my hand and seal and declare this instrument to be my Last Will and Testament this 18th day of March, One thousand nine hundred and forty-six.

/s/ EDWARD F. PIPE (L. S.)

The foregoing instrument was, on the day of the date thereof, signed, sealed, published and declared by EDWARD F. PIPE, the Testator therein named, as and for his Last Will and Testament in the presence of us, the undersigned, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

HENRY D. STRACK
Residing at 159 Ralph Ave., White Plains, N. Y.

ERNEST A. FINTEL
Residing at 327 Hollywood Ave., Douglaston, L. I., N. Y.

KENNETH C. JOHNSON
Residing at 60 Sargent Road, Scarsdale, N. Y.

Opinion.

23 T. C. No. 14

THE TAX COURT OF THE UNITED STATES

ESTATE OF EDWARD F. PIPE, DECEASED, NETTIE M. PIPE, EXECUTRIX, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 39831. Filed October 22, 1954.

Spouse's bequest of legal life estate coupled with unlimited lifetime power of invasion but with remainders over, *held* not to qualify for the marital deduction from

gross estate permitted by section 812 (e), Internal Revenue Code of 1939.

EDMUND W. PAVENSTEDT, Esq., for the petitioner.

RIGMOR O. CARLSEN, Esq., for the respondent.

OPPER, Judge: A deficiency of $21,861.98 in estate tax is here being contested, of which $19,310.29 is in controversy. The sole issue is whether decedent's disposition of certain property qualifies for the marital deduction provided by section 812 (e), Internal Revenue Code of 1939.

All of the facts have been stipulated. They are found accordingly. The estate tax return was filed with the collector for the fourteenth district of New York. Decedent, who died a resident of White Plains, New York, on September 20, 1948, was survived by his widow who became executrix of his estate.

The will which was admitted to probate November 10, 1948, after devising to his wife all real property absolutely and forever, together with certain personal effects, provides in part:

> THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my "residuary estate", I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

> I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.
>
> FOURTH: On the death of my said wife * * * I give and bequeath all * * * of the property which can be identified at my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees].

The value at the optional valuation date of the property passing under article THIRD of the will was $217,429.84, all of which was included in the gross estate.

The question presented involves the construction of section 812 (e) of the estate tax law as enacted[1] in 1948: Does property bequeathed to a surviving wife for life, with unlimited powers of invasion or disposition during her lifetime, but with remainders over as to any residue left at her death, qualify for the marital deduction or does the wife acquire merely a "terminable interest" included in the

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[1] Internal Revenue Code of 1939.

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

exception provided in subsection (e) (1) (B) of the same section.[2]

(e) *Bequests, Etc., to Surviving Spouse.*—

(1) Allowance of Marital Deduction.—

(A) In General.—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

* * * * * * *

(F) Trust with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent in trust, if under the terms of the trust the surviving spouse is entitled for life to all the income from the corpus of the trust, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire corpus free of the trust (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the corpus to any person other than the surviving spouse—

(i) the interest so passing shall, for the purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for the purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall be applicable only if, under the terms of the trust, such power in the surviving spouse to appoint the corpus, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

[2] (B) Life Estate or Other Terminable Interest.—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other

Petitioner's contention that what the wife took is the equivalent of a fee and consequently cannot be "terminable" does not seem to be advanced with any great conviction. It is in fact inconsistent with petitioner's own alternative argument and with an analysis of the New York law.

Section 149, New York Real Property Law, applicable as well to personalty, modifies the Rule in Shelley's Case by providing:

> Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular estate for life * * * such estate is changed into a fee absolute *in respect to the rights of creditors, purchasers and incumbrancers, but subject to any future estate limited thereon, in case the power of absolute disposition is not executed* * * * [Emphasis added.][3]

The intention of the testator is, as always, paramount.

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than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse; and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii))—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

[3] In this respect the present case is stronger for respondent than was the second issue in *Estate of Frank E. Tingley*, 22 T. C. ..... (May 26, 1954).

Thus, in *In re Mead's Will*, 115 Misc. Rep. 481, 190 N. Y. S. 123, the Surrogate was of the opinion that remainders over were not established with sufficient assurance to restrict the application of section 153, New York Real Property Law,[4] so that the power of disposition by the life tenants was "absolute";[5] while in *Terry* v. *Wiggins*, 47 N. Y. 512, a provision similar to that now before us was said to "clearly indicate an intention" to limit the wife's power of disposition to her life so that "By the will, the wife took an estate for life, * * * with remainder over at her death to the religious society, with power in the wife during the continuance of the life estate to defeat the remainder * * *," a description sufficiently apt to be applicable to the present situation. And see *Estate of Michael Melamid*, 22 T. C. ..... (July 23, 1954); *In Re Brower's Estate*, 278 App. Div. 851, 104 N. Y. S. 2d 658, affd. 304 N. Y. 661, 107 N. E. 2d 589.

Inconsistently, as it seems to us, petitioner insists as an alternative that what was accomplished was the creation of a trust, of which the wife was trustee and life beneficiary, with remainders over, but with an unqualified lifetime power over the corpus not only of disposition but of enjoyment and consumption. This is said to bring the situation within section 812 (e) (1) (F).[6]

That the life tenant in possession is often loosely referred to by the term "trustee" in the New York cases

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[4] SEC. 153. When power of disposition absolute.

Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit, is deemed absolute.

[5] But see *In Re Davies' Estate*, 242 N. Y. 196, 151 N. E. 205, 206, where the language of the will was similar to that now in controversy. "* * * as legatee he [the husband] received a life interest therein, with power 'to expend the principal as he may see fit,' and even though the power to expend was untrammeled by any conditions, it did not include the right to transfer it to himself so that he might hold it in fee absolute."

[6] See footnote 1, *supra*.

cannot be denied.[7] The references fall generally into two groups. In some, such as *Smith et al.* v. *Van Ostrand*, 64 N. Y. 278, for example, a restriction is placed by the will on the invasion of corpus. In that case only so much as was necessary "to her support" could be taken from principal. In *Leggett* v. *Stevens*, 185 N. Y. 70, 77 N. E. 874, the use was permitted by the surviving wife "for her own comfort and support."[8] In other instances the bequest has been construed as forbidding any invasion even with language like "use and enjoy" the property, as in *In re McDougall*, 141 N. Y. 21, 35 N. E. 961, 963:

> * * * On the contrary, we think the testator meant to give the widow nothing but an estate for her life or widowhood, terminable at the happening of either event, and that the remaindermen were entitled to receive at such time the *whole* corpus of the estate. [Emphasis added.]

See also *In re Ungrich*, 48 App. Div. 594, 62 N. Y. S. 975, aff'd. per curiam 166 N. Y. 618, 59 N. E. 1131; *In re Hamlin*,

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[7] This is not always so. In *Rose* v. *Hatch*, 125 N. Y. 427, 26 N. E. 467, for example, an express trust in favor of the husband, with a power of disposition limited to his personal needs was held to establish not a trust, but a legal life estate, preventing the merger with the fee, even as to creditors, because of the limitation. Holding that in such a situation a trust could not exist, the Court of Appeals said: "By the second clause of the will there was an attempt to make Asa L. Hatch [the husband] trustee for his own benefit during his life. Such a trust cannot be created. * * * Asa L. Hatch was, however, entitled to the possession of the land, and also to the rents and profits thereof, * * * it is clear that he took a legal estate in the land for life."

[8] In *Peck* v. *Smith*, 227 N. Y. 228, 125 N. E. 91, 92, the trial court "* * * found that * * * his widow had an absolute power of disposition, irrespective of her needs, and could make a valid gift * * * *" of the properties. "These findings were reversed by the Appellate Division * * * it found that the transfer was not made for the use, comfort, and benefit of Mrs. Peck * * *." The Court of Appeals in turn reversed, but on the ground that the plaintiffs had no capacity to sue.

141 App. Div. 318, 126 N. Y. S. 396. The employment of the trust concept in such situations is even less significant on the present point.

Where the power of disposition and invasion, though restricted to the period of the life tenancy, is unlimited, the "trust" if any is said to attach not to the property received by the life tenant, but at most to that which remains on his death.[9] That is apparently the outer limit of the present situation.

The rule is enunciated in *Seaward* v. *Davis*, 198 N. Y. 415, 91 N. E. 1107. " * * * It is doubtless true that *ordinarily* a life tenant in possession of personal property is a trustee *to preserve the principal* for the remaindermen to whom it may pass on his death. In this case, however, *the widow had the right to dispose of the property in her lifetime, and as to such property as she did dispose of* neither she nor her executor was bound to account to the remaindermen because they had no interest in it. * * *." [Emphasis added.] As petitioner expresses it, the question in that case "was the quantum of the trust with respect to which her executor must acount: Was it the full amount she received from her husband's estate *or merely the amount which remained undisposed of at her death?*" [Emphasis added.]

We think it follows that even if there was an implied trust here, and even if, contrary to respondent's contention, such a "trust" is covered by section 812 (e) (1) (F), and even if, in spite of the apparent language of the New York statute,[10] the wife could then use for herself the corpus of

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[9] "This disposition * * * would entitle the plaintiffs to so much of the fund as on her death remained unexpended. * * * *and this portion of the fund* she held in trust for them." *Smith et al.* v. *Van Ostrand, supra.* [Emphasis added.]

[10] " * * * A power vested in a person in his capacity as trustee of an express trust, to distribute principal to himself cannot be exercised by him * * * ; if there is no trustee qualified to execute the power, its execution devolves on the supreme court." Sec. 141, N. Y. Real Property Law. [Emphasis added.] And see *Rose* v. *Hatch, supra,* footnote 7.

the trust, as obviously the testator intended, and even if that question is to be governed by the local law of each of the 48 states, but cf. *Lyeth* v. *Hoey*, 305 U. S. 188, still the corpus constituting this trust would not only be less than the total share left to the wife, see *Estate of Louis B. Hoffenberg*, 22 T. C. ..... (September 17, 1954), but it would be so indefinite as to render impossible of identification at decedent's death what property is subject to the trust and therefore intended to be covered by section 812 (e) (1) (F). This seems to us an adequate reason for presuming that it was not the congressional intent to include this type of "trust" in the marital deduction provisions of that subsection.

Generally speaking, the "terminable interest" concept was devised for the purpose of assuring that if the property bequeathed to the spouse was to be excluded from gross estate with respect to the decedent, it would be adequately integrated in the spouse's estate so that on her death it would not escape the death tax a second time. As petitioner expresses it "The basic principle * * * is that the spouse first to die shall be permitted to pass on to the surviving spouse free of estate tax up to one-half of his or her estate, provided only that the terms of the transfer are such that this property will be taxable in the estate of the surviving spouse."

In the premises, the existence and scope of any "trust" established for the wife by decedent is so doubtful that it would scarcely seem logical to include the property in the wife's estate, if, when she dies, the corpus has neither been consumed nor donated. In that event, her failure to exercise the power of invasion will make it more reasonable to think of the remaindermen as succeeding to property left them by decedent.[11] We think the basic purpose of section

[11] In *Helvering* v. *Safe Deposit Co.* (Reynolds Est.), 316 U. S. 56, the Supreme Court had before it the question of including in gross estate as an "interest" under section 302 (a), Revenue Act of 1926, the predecessor of section 811 (a), property as to which dece-

812 (e) will hence be more adequately accomplished by considering the wife's interests here as "terminable," and by inclusion of the property in decedent's estate. See *Estate of Louis B. Hoffenberg; Estate of Michael Melamid,* both *supra.*

For the purpose of correcting an adjustment now conceded by respondent, and of taking into consideration estate expenses subsequently incurred,

Reviewed by the Court.

Decision will be entered under Rule 50.

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dent had a qualified beneficial life estate and a testamentary power of appointment which was unexercised at his death. The question was answered in the negative by a unanimous court. Four of the justices dissenting on another point, used this language: "It is conceded that no part of either estate passed by virtue of the execution by the decedent of the powers of appointment with which he was clothed. The property passed under the deed and wills of his parents, and that passage was the taxable event."

While under section 811 (f) property covered by certain unexercised powers of appointment is now taxable, it is evident from the restrictive language of section 812 (e) that Congress did not have this simple situation in mind in granting the marital deduction. We do not understand petitioner to contend otherwise.

[R. 241]

Decision.

THE TAX COURT OF THE UNITED STATES.

Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner, v. Commissioner of Internal Revenue, Respondent.	Docket No. 39831.

Respondent having on March 18, 1955, filed a recomputation of tax for entry of decision as in accordance with Opinion of the Court, filed October 22, 1954, and petitioner having concurred therein, now, therefore, it is

Ordered and Decided: That there is an overpayment of estate tax in the amount of $114.76 which was paid after the mailing of the notice of deficiency and within the time provided by Section 912, Internal Revenue Code of 1939.

(Signed) Clarence V. Opper,
Judge.

Entered Mar. 21, 1955.

[R. 242-247]

Petition to Reverse Decision.

THE TAX COURT OF THE UNITED STATES.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, Petitioner on Review, v. COMMISSIONER OF INTERNAL REVENUE, Respondent, Respondent on Review.	Docket No. 39831.

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Now comes petitioner, petitioner on review, by its attorney, Edmund W. Pavenstedt, and respectfully shows:

I

Petitioner is Nettie M. Pipe, Executrix under the last Will and Testament of Edward F. Pipe, deceased. Petitioner resides at 18 Midland Avenue, White Plains, New York. The decedent died testate on September 20, 1948, a resident of the State of New York and petitioner duly qualified as Executrix under decedent's last Will and Testament pursuant to letters testamentary issued by the Surrogate's Court of Westchester County, State of New York, under date of November 10, 1948. The petitioner filed a Federal Estate Tax Return with the Collector of Internal Revenue for the Fourteenth District of New York, whose office is

located in the judicial circuit of the United States Court of Appeals for the Second Circuit. Respondent on review (hereinafter referred to as "Commissioner") is the duly authorized and acting Commissioner of Internal Revenue holding his office by virtue of the laws of the United States.

II

The Commissioner determined a deficiency in estate tax against petitioner in the amount of $21,861.98 and sent petitioner notice thereof by registered mail under date of January 30, 1952, in accordance with the provisions of Section 871(a) of the Internal Revenue Code of 1939, as amended. This deficieny did not allow credit for a voluntary payment of additional estate tax amounting to $2,551.69 which the petitioner had made to the Collector of Internal Revenue for the Fourteenth District of New York on February 17, 1950. Thereafter, on April 7, 1952, petitioner duly filed an appeal from said deficiency with the Tax Court of the United States. Thereafter the petitioner paid to said Collector $19,310.29, which is the difference between the deficiency of $21,861.98 and the prior payment of $2,551.69. The hearing on said appeal before the Tax Court of the United States was held in New York on March 30, 1953 before the Honorable Clarence V. Opper, Judge. The Tax Court filed its findings of fact and opinion on said appeal on October 22, 1954. Application for rehearing was denied by the Tax Court on November 23, 1954. Pursuant to an agreed computation made under The Tax Court's opinion, it entered its decision on March 21, 1955, adjudging that there was an overpayment of estate tax in the amount of $114.76 which was paid after the mailing of the notice of deficiency and within the time provided by Section 912, Internal Revenue Code of 1939.

III

The issue is whether the Commissioner erred in determining that bequests to the surviving spouse of decedent in the amount of $217,429.84 did not qualify for the Federal estate tax marital deduction under Section 812(e) of the Internal Revenue Code of 1939, and consequently erred in failing to allow as a deduction from the gross estate of the decedent under Section 812(e) of the Internal Revenue Code of 1939 the amount of $141,473.55, representing the marital deduction for bequests to the surviving spouse of the decedent.

IV

The facts, as stipulated and as found by The Tax Court are:

Edward F. Pipe died testate, on September 20, 1948, a resident of White Plains, New York. His widow, Nettie M. Pipe, the petitioner herein, was appointed executrix by the Surrogate's Court of Westchester County, State of New York, on November 10, 1948. The petitioner's address is 18 Midland Avenue, White Plains, New York.

The Federal estate tax return for the estate of Edward F. Pipe was filed with the Collector of Internal Revenue for the Fourteenth District of New York.

In said Federal estate tax return, the petitioner elected to have the gross estate of the decedent valued in accordance with values as of a date or dates subsequent to the decedent's death, as authorized by Section 811(j) of the Internal Revenue Code of 1939 (hereinafter sometimes referred to as the "optional valuation date"). The Commissioner, in determining a deficiency, added to the value of the net estate $59,982.50 described as "Marital Deduction." He explained

"The deduction claimed in the return, Form 706, as bequests to the surviving spouse in the amount of $217,426.29 is disallowed, it having been determined that the bequest does not qualify for deduction under Section 812(e) of the Internal Revenue Code."

Decedent in his last Will and Testament provided as follows:

"THIRD: All the rest, residue and remainder of my estate, of whatsoever nature and wheresoever situated, hereinafter referred to as my 'residuary estate', I give, devise and bequeath to my wife, NETTIE M. PIPE, to have and to hold the same for the term of her natural life, with full power to use, enjoy, sell or dispose of the income and principal thereof, or any part thereof, for such purposes or in such manner as she in her uncontrolled discretion may choose, it being my desire to place no restraint on her in any respect concerning the absolute right of full disposition and use of the whole or any part of said income or principal of my residuary estate, except that she shall have no power over the disposition of such part thereof as remains unexpended at the time of her death.

"I direct that my said wife shall not be required to file any bond or other security for the protection of any remainderman interested in my said residuary estate, and she shall not be limited in investing and reinvesting the same to securities of the kind authorized by law for the investment of trust funds. During the life of my said wife, any stocks, bonds or other securities may be registered in the name of my said wife alone as if she were the absolute owner of such property, and no one dealing with her with respect to my residuary estate shall be responsible for the application of any proceeds of sale or other disposition of property.

"FOURTH: On the death of my said wife * * * I give and bequeath all the rest of the property which can be identified on my wife's death as a part of my residuary estate * * * absolutely, to [certain named legatees]."

The value at the option valuation date of the property passing under Article THIRD of the decedent's will was $217,429.84.

The entire value of the property, valued as of the optional valuation date, passing under Article THIRD of decedent's will, was included in the decedent's gross estate in the Federal estate tax return filed by petitioner and in the statement attached to the notice of deficiency dated January 30, 1952 referred to in paragraph II hereof.

V

The assignments of error are:

The Tax Court erred

(1) in concluding that the bequest under Article THIRD of the decedent's will does not qualify for the marital deduction under Section 812(e) of the Internal Revenue Code of 1939.

(2) In failing to conclude that the bequest under Article THIRD of the decedent's will qualifies for the marital deduction under Section 812(e) of the Internal Revenue Code of 1939.

WHEREFORE, petitioner prays that the decision of The Tax Court of the United States be reversed by the United States Court of Appeals for the Second Circuit and that a transcript of the record be prepared in accordance with the law and the rules of said Court and transmitted to the Clerk of such Court, and that appropriate action be taken

to the end that the errors complained of may be reviewed and corrected by said Court and that this judgment and order by The Tax Court of the United States be reversed.

Dated: June 14, 1955.

Respectfully submitted,

EDMUND W. PAVENSTEDT,
Attorney for Petitioner,
Petitioner on Review,
14 Wall Street,
New York 5, N. Y.

WHITE & CASE, Esqs.,
14 Wall Street,
New York 5, N. Y.
Of Counsel.

[R. 248]

Notice of Filing Petition for Review.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner on Review, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent on Review.	Docket No. 39831.

To:

JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service.

You are hereby notified that the above-named petitioner did, on the 15th day of June, 1955, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Second Circuit, of the decision of this Court heretofore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 15th day of June, 1955.

/s/ VICTOR S. MERSCH
VICTOR S. MERSCH,
Clerk,
The Tax Court of the United States.

Service of copy of Petition for Review acknowledged this 15th day of June, 1955.

JOHN POTTS BARNES, R.
Chief Counsel
Internal Revenue Service
Attorney for Respondent.

[R. 249]

Certificate.

THE TAX COURT OF THE UNITED STATES

WASHINGTON, D. C.

ESTATE OF EDWARD F. PIPE, Deceased, NETTIE M. PIPE, Executrix, Petitioner, *vs.* COMMISSIONER OF INTERNAL REVENUE, Respondent.	Docket No. 39831.

I, VICTOR S. MERSCH, Clerk of the Tax Court of the United States, do hereby certify that the foregoing pages 1 to 248, inclusive, constitute and are all of the original papers and proceedings, including exhibits 1-A and 2-B attached to the Stipulation of Facts, on file in my office as the original and complete record in the proceeding before The Tax Court of the United States entitled: "Estate of Edward F. Pipe, Deceased, Nettie M. Pipe, Executrix, Petitioner *v.* Commissioner of Internal Revenue, Respondent, Docket No. 39831" and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 18th day of July, 1955.

/s/ VICTOR S. MERSCH,
Clerk,
The Tax Court of the United States.

(SEAL)

Last day to file record:
July 25, 1955.